Taos Health Systems, Inc. d/b/a Holy Cross Hospital and Professional Performance Association and Professional Performance Association Affiliates, Affiliated with District 1199NM National Union of Hospital and Health Care Employees, AFL-CIO. Case 28-CA-12227

December 19, 1995

## **DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On February 28, 1995, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions,<sup>2</sup> and to adopt his recommended Order.

## **ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Taos Health Systems, Inc., d/b/a Holy Cross Hospital, Taos, New Mexico, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Lewis S. Harris, Esq., for the General Counsel.

Robert P. Tinnin Jr., Esq. (Hinkle, Cox, Eaton, Coffield & Hensley), for the Respondent.

Carol Oppenheimer, Esq., with David R. Richards, Esq. (Simon & Oppenheimer), for the Charging Party.

#### **DECISION**

## STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. The issues in this case are whether Taos Health Systems, Inc. d/b/a Holy Cross Hospital (Respondent or the Hospital): (1) violated its legal duty to bargain with the Professional Performance Association and Professional Performance Association Affiliates, affiliated with District 1199NM National Union of Hospital and Health Care Employees, AFL-CIO (the Union) by unilaterally eliminating its house supervisor position during the term of a collective-bargaining agreement covering that position or, in the alternative, transferred the duties of that position to nonunit personnel; (2) threatened legal action or discipline against employees and promulgated a new confidentiality policy to prevent the Union from conducting an employee survey and publicizing its results; and (3) disciplined Christine Martinez for her legally protected employee activities. I have concluded the first two issues merit an affirmative response but the third does not.

The Union initiated this case by filing a charge on October 13, 1993.¹ After the Union amended its charge on November 24, the Regional Director for Region 28 of the National Labor Relations Board (NLRB or the Board), acting for the NLRB General Counsel, issued a formal complaint on November 30 encompassing the first two of the noted issues. The General Counsel amended the complaint at the hearing to expand the house supervisor issue and to add the Martinez issue. Respondent filed a timely answer denying that it engaged in the unfair labor practices alleged and I treated the allegations added at the hearing as denied.

I heard this matter on March 15 and 16, 1994, at Taos, New Mexico. The General Counsel presented oral argument at the hearing and later supplemented that argument with a short brief. Respondent and the Charging Party filed timely posthearing briefs. Thereafter, the Supreme Court delivered its opinion in *NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. 1778 (1994), wherein it concluded that the Board's test for determining the supervisory status of individuals employed in the health care industry was not consistent with the Act.<sup>2</sup> Because of the potential significance of that decision to the house supervisor issues in this case, I granted Respondent's motion to file a supplemental brief addressing the import of that holding. All parties filed supplemental briefs. Having now carefully considered the record, the General

<sup>&</sup>lt;sup>1</sup>The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's finding that the Respondent did not violate the Act by disciplining employee Christina Martinez.

<sup>&</sup>lt;sup>2</sup> In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) of the Act by its virtual elimination of the house supervisor position, we emphasize that once a specific job has been included within the scope of the unit by either Board action or the consent of the parties, the employer cannot remove the position without first securing the consent of the union or the Board. *Hill-Rom Co.*, 957 F.2d 454, 457 (7th Cir. 1992).

<sup>&</sup>lt;sup>1</sup> If not shown otherwise, all further dates refer to the 1993 calendar year.

<sup>&</sup>lt;sup>2</sup> In a nutshell, Sec. 2(11) of the Act defines supervisors as any individual who exercises independent judgment while performing 1 or more of 13 specified duties "in the interest of the employer." With only limited exceptions, supervisors do not enjoy the Act's protection. For a number of years, Board decisions concerning supervisors excluded from consideration those duties performed by health care workers in connection with patient care on the ground that those workers were acting in the interest of the patient and not their employer. The majority opinion in *Health Care* decision concluded that the Board's test created a "false dichotomy" as the business of health care employers was patient care. Accordingly, the Court concluded that the Board's test was inconsistent with the statute as well as the Court's prior precedent.

Counsel's oral argument and all posthearing briefs, I make the following

## FINDINGS OF FACT

#### I. JURISDICTION AND BACKGROUND

Respondent, a New Mexico corporation, operates a 28-bed acute care hospital in Taos. In the 12-month period preceding the Union's charge, Respondent's direct inflow was far in excess of a de minimus amount necessary to establish the Board's statutory jurisdiction and its gross revenues exceeded the Board's discretionary standard applicable to hospitals. Accordingly, I find the Board's jurisdiction over this labor dispute is clearly established.

When this case was heard, plans were underway to relocate the Hospital's operations to a new facility in August. The capacity at the new facility will increase to 40 or so beds and the various operations will be structurally compartmentalized to a greater degree.

The two components of the Union—the Professional Performance Association (PPA) and the Professional Performance Association Affiliates (PPAA)—appear to have been separately certified as the employee representative for two different units at the Hospital. The original PPA unit includes the registered and licensed practical nurses (the nurses' unit); the PPAA unit appears to apply to all other hospital employees. The PPA and the PPAA continue to elect separate officers even though they are now affiliated with District 1199NM.

Over the years the Hospital and the Union have maintained a series of successive collective-bargaining agreements. The most recent agreement (encompassing both units) is effective by its terms from June 1 through May 31, 1995. Historically, the nurses' unit has included charge nurses who are now classified as house supervisors.

The Hospital's board of directors (Directors) retains a professional management firm to provide executive management of the Hospital. In early 1992, the Directors solicited bids for its management contract and established a selection committee to review bid proposals. Maria Visse, president of the PPA at that time, and Denise Corriveau, president of the PPAA, accepted the Board's invitation to sit on the selection committee.

Bidders for the management contract made presentations at a public forum held in Taos in April 1992. During its presentation, agents of Quorum Health Resources (Quorum), the management company ultimately selected, distributed a summary of its proposal which included a section devoted to the methods it would utilize to "[m]aintain and increase employee satisfaction including, but not limited to, how [Quorum] intends to relate to the two unions at [the] Hospital." That proposal section further states that Quorum would implement its Hospital Quality Trends (HQT) Employee Survey "to confidentially survey employee satisfaction with the workplace, management, and peer groups." Data collected from the survey would be "the foundation to create pro-active change in the organization that will enhance employee morale and satisfaction" and, according to Quorum's proposal, could result in courses of action that would include modifying job descriptions, implementing an incentive compensation program, or designing a new wage and salary program. Based in part on the promised employee surveys, Visse and Corriveau supported the selection of Quorum as the new management company.

Following its selection in June 1992, Quorum installed Rita Campbell as the Hospital's chief executive officer, Billy Vigil as the chief financial officer, and Susan Montgomery as the director of nursing services. Montgomery had been affiliated with the Hospital for a number of years in a variety of nursing management positions but Campbell had no previous connection with the Hospital. Vigil's prior affiliations are unknown. Rosalie Sanchez continued to function as the Hospital's personnel director. Campbell, Vigil, and Montgomery are employed directly by Quorum; Sanchez is not. At relevant times, the Hospital employed approximately 48 registered nurses, 10 licensed practical nurses, and 10 to 12 aides in the nursing services division. Nurses work three shifts each day of the year. The shifts run from 7 a.m. to 3 p.m., 3 to 11 p.m., and 11 p.m. to 7 a.m. Four department heads and four nurse managers serve under Montgomery in the division hierarchy. Historically, they have been excluded from the unit as supervisors. A house supervisor is assigned to each shift. As noted, the house supervisors have always been included in the unit. On weekends and throughout the evening and night-shift hours after Montgomery, the department heads and the nurse managers leave the Hospital, one or more of them are on-call but no clear-cut, nursing services manager or supervisor is present on the premises.3

Pursuant to the collective-bargaining agreement, the house supervisors are paid a position differential which varies with their assigned shift. Hospital employees are paid twice monthly. If not all employees, then at least some of the house supervisors are responsible for submitting a timesheet which is used for payroll purposes. Under a policy in effect for some time, pay shortages not attributable to the employee are corrected forthwith but those errors attributable to the employee are not corrected until the employee is next paid.

In February, the parties commenced negotiations for the current collective-bargaining agreement which replaced the predecessor agreement then set to expire at the end of May. Early in negotiations, Respondent sought to exclude the house supervisors from the nurses' unit on the ground that they were supervisors within the meaning of the Act. The Union vigorously resisted this effort, in part, because some of the house supervisors were union officers and bargaining committee members. In an effort to resolve that issue, the Hospital filed a unit clarification (UC) petition with NLRB Region 28 in April.

Apparently because the pending UC matter had not been decided as the contract expiration date approached, the parties' executed a written memorandum of understanding on May 20 to deal with the exigency posed by that case. In essence the memorandum detailed a procedure by which any house supervisor could elect to return to the bargaining unit ''[s]hould the Regional Director . . . rule in the unit clarification proceeding . . . that House Supervisors are 'supervisors' within the meaning of Section 2(11) of the Act and if, as a result of the ruling, the Hospital elects to remove this job classification from the bargaining unit.'' Although the memorandum does not allude to such an understanding, Dianne Justin-Harris, the Union's principal negotiator, testi-

<sup>&</sup>lt;sup>3</sup> These findings are based on the findings of the Regional Director for Region 28 in a unit clarification case discussed below.

fied without contradiction that Vigil, the Hospital's principal negotiator, also agreed that the Hospital would not seek review of an adverse UC decision as it would be legally entitled to do.

On June 14, the Regional Director issued his UC decision finding insufficient evidence to conclude that the house supervisors were supervisors within the meaning of the Act. In reaching this conclusion, the Regional Director clearly relied on the now defunct line of cases holding that supervisory duties exercised by nurses incidental to their professional duties in treating patients is not supervision within the meaning of Section 2(11) of the Act. As agreed, the Hospital did not seek review of that decision. Consequently, the house supervisors remained in the nurses unit for the term of the 1993–1995 collective-bargaining agreement.

Article 4 of the current agreement carried over identical language contained in the prior agreement concerning management rights. In addition to standard management-rights language, this portion of the agreement provides in part:

The sole and exclusive right of management, except to the extent expressly abridged by this Agreement, shall include, but are not limited to the following rights:

5. to establish, maintain or modify job descriptions and job requirements, and the standards thereof,

8. to determine the size and composition of the work force,

10. to hire, assign, lay off, transfer and promote employees,

Article 8 of the agreement was also carried over from the prior agreement. It provides in part:

Job descriptions developed for all Hospital employees will identify their primary duties and responsibilities. Job descriptions will be reviewed with employees before changes are made.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. The House Supervisor Issue

# 1. The relevant evidence

In the period between the issuance of the UC decision and October, Campbell and Montgomery met on several occasions to develop a plan to assure the presence of around-theclock nursing supervision. In their view, the testimony at the UC hearing disclosed that a significant number of the house supervisors were not exercising the authority intended by their existing job descriptions to the detriment of necessary communication between management and the nursing employees. For example, Montgomery testified that incident reports were not prepared in certain cases when she felt they should have been so that management learned only haphazardly of certain events. Campbell, on the other hand, perceived 24-hour nursing supervision as essential in order to secure the accreditation sought by the Hospital. Eventually, these two managers devised a plan to create a new shift manager position and secured approval for their plan from the Directors

On October 4, Montgomery and Sanchez met with the two unit presidents, Visse and Corriveau, to announce the plan. The substance of this meeting is largely undisputed. The union agents were advised that the Hospital had created a new shift manager supervisory position in order to have a management presence at the hospital on weekends and during nonbusiness office hours. Management provided the union agents with copies of the shift manager's job description and advised that the current house supervisors could apply for the position. Those house supervisors who elected not to apply for the shift manager position (and, presumably, those who were not chosen) would be "absorbed back into the hospital as Med-surg staff, or whatever, because [the Hospital was] short by five FTEs on the floor." After the four new shift managers were all employed, the house supervisors would function only in relief of absent shift managers and, apart from those relief periods, the house supervisor contractual pay differential would not be paid.

Immediately after this meeting the same two management representatives met with the house supervisors to explain the reorganization and encourage them to apply for the new shift manager's positions. Suffice it to say that the plan was not well received by most of the house supervisors. Nevertheless, the Hospital forged ahead with its plan by advertising the shift manager's position in the October 7 edition of the local newspaper. As a result of the ad, the Hospital hired Judy Lockwood, who had not previously worked at the Hospital, as the weekend shift manager. Except in Shift Manager Lockwood's absence, the previous weekend house supervisors ceased to serve in that capacity.

On November 23, Montgomery wrote to Linda Buckingham, who succeeded Visse as the PPA president, enclosing a house supervisor job description effective the following day which superseded the previous job description of September 1, 1992. Consistent with the overall plan, the new job description specifically stated in the job summary section that a "House Supervisor acts in a relief capacity in the absence of a Hospital Shift Manager."

On February 17, 1994, Campbell wrote to Buckingham advising that the Hospital had "reexamined our action" regarding implementation of the new shift manager position "in light of issuance by the NLRB of a Complaint in Case No. 28-CA-12227." Campbell went on to explain that the Hospital had revised the house supervisor's job description and enclosed a copy of the revised description which contained wholesale changes in the duties and responsibilities' section from the job description provided Buckingham in November and from the September 1992 job description. The overall objective of the revised job description, Campbell explained in the letter, was to specify that the house supervisors would act "in a charge capacity at all times and [would] assume the duties of the Shift Managers in a relief capacity." The letter also states that the house supervisors' "[c]ompensation will remain the same" and that the revised description would be effective only when all four of the new shift managers had been employed.

Campbell and Montgomery assert that the February 1994 house supervisors' job description revisions were designed to remove any language of a supervisory nature, which in their view existed in prior editions. Montgomery further explained that this revision also limited the scope of the house supervisors' responsibilities to specified units. The job description

Campbell sent to Buckingham confirms this fact. Thus, the job summary section provides that "the House Supervisor will manage patient assignment on Med-Surg and apply leadership skills to oversee Medical Surgical Patient care."

Because the new shift manager plan as modified in February envisions an increase in the level of patient care, i.e., oversight of patient care by a shift manager plus a house supervisor acting in a charge capacity in each unit, the Hospital did not immediately implement the plan on the weekend shifts where a shift manager already worked. To do otherwise, according to Montgomery, would effectively create a different level of care on the weekend.<sup>4</sup> According to Campbell, the Hospital did not intend to fully implement the February revision until all of the shift managers were hired. In the interim, she testified, house supervisors would relieve a shift manager who had been hired but was absent.

#### 2. Further findings and conclusions

Section 8(a)(5) of the Act compels an employer "to bargain collectively with the representatives of his employees." The perimeters of the duty to bargain collectively are defined in Section 8(d) of the Act. Among other things, Section 8(d) requires the parties to a collective-bargaining contract to refrain from terminating or modifying the contract without adhering to certain procedures, including an offer "to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications."

During the term of a collective-bargaining agreement, an employer violates Section 8(a)(5) by modifying an explicit or implicit term of the agreement without the union signatory's consent or the union's "clear and unmistakable" waiver of its statutory right to bargain concerning the matter at issue. Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983); and Bonnell/Tredgar Industries, 313 NLRB 789 (1994), enfd. 46 F.3d. 339 (4th Cir. 1995). If a modification, however, technically pertains to a mandatory subject of bargaining but results in no significant detriment to unit employees, an employer is at liberty to act unilaterally. Alamo Cement Co., 277 NLRB 1031 (1985); and Westinghouse Electric Co., 153 NLRB 443, 446 (1965). If the contractual unit includes supervisors, the Board and the courts will enforce these general collective-bargaining principles against the unilateral repudiation of the agreement's terms applicable to unit supervisors in the interest effectuating the Act's policy of stabilizing the established labor relations climate. Union Plaza Hotel & Casino, 296 NLRB 918 (1989), enfd. sub nom. E. G. & H., Inc. v. NLRB, 949 F.2d 276 (9th Cir. 1991).

As Respondent admits that it unilaterally implemented the shift manager position, the General Counsel and the Union contend that Respondent violated Section 8(a)(5) of the Act. This is so, they argue, because Respondent's October 4 action effectively eliminated the house supervisor's job, which

historically had been covered by the collective-bargaining contract. Alternatively, the General Counsel asserts that Respondent failed to meet its duty to bargain by transferring certain duties from the house supervisors within the collective-bargaining unit to the shift managers outside the unit. As the General Counsel and the Union believe that Respondent has no legal justification for this unilateral action, the conclusion is warranted that it violated the law.

Both the General Counsel and the Union contend in their supplemental briefs that the *Health Care* decision has no impact here. Contrary to Respondent, they assert that the outcome of the UC case would be the same employing the standard supervisor test rather than the test disapproved in the *Health Care* case. Even assuming otherwise, they contend that Respondent voluntarily executed the current agreement and cannot eliminate or modify the terms and conditions applicable to the house supervisors unilaterally. The General Counsel further contends that Respondent is foreclosed by operation of law from reopening the UC decision because of the subsequent *Health Care* decision.

In its initial brief, Respondent argues that it had no bargaining obligation because "there was no substantial loss of bargaining unit work as a result of the creation of the shift manager position." In addition, Respondent asserted that the Union waived its right to bargain "with respect to [the] creation of the shift manager position by express agreement to the management rights and zipper clauses in the parties' collective bargaining agreement."

In its supplemental brief, Respondent argues in essence that it took steps to secure the removal of the house supervisors from the unit before executing the current collectivebargaining agreement. Respondent now argues that "[w]hen the factual findings in the UC proceeding . . . are read in light of the [Health Care] decision, it is clear that [the] house supervisors meet the statutory definition of 'supervisor." Hence, Respondent argues in effect that absent the use of the Board's flawed legal test in the UC decision, the house supervisors would have been excluded from the unit as it requested in that earlier proceeding. For this reason, Respondent contends it never voluntarily agreed to the inclusion of the house supervisors in the current collective-bargaining agreement and, therefore, the Board cases enforcing employer adherence to agreements voluntarily made even though the unit covered includes statutory supervisors are inapposite.

Everyone appears to agree that the shift managers will be supervisors within the meaning of the Act and that Respondent was free to unilaterally establish this new supervisory position. Respondent, however, obviously believed, in order to avoid overlapping responsibilities, the establishment of the shift manager's position required concurrent changes in the house supervisor position. The core of this dispute does not involve Respondent's right to unilaterally establish a supervisory position but rather the effects of that action on the existing jobs and pay of the unit employees.

Based on this record, I conclude that Respondent's plan to establish the shift manager's position as announced to the union agents and the house supervisors on October 4, and as revised in February 1994, involved a substantial impact on the terms and conditions of the unit house supervisors. As originally announced on October 4, the shift manager's plan contemplated the virtual elimination of the contractual house

<sup>&</sup>lt;sup>4</sup>No additional shift managers had been hired by the time of the hearing but Respondent anticipated filling the remaining three slots in the quarter following the hearing. In view of Montgomery's explanation, and in the absence of any contrary evidence, I have assumed that the house supervisor or supervisors displaced on the weekend shifts by Lockwood were still not receiving the house supervisor differential as of the time of the hearing except during Lockwood's absences

supervisor position and the premium pay the position carried.<sup>5</sup> Later that month, the Hospital partially implemented that plan by hiring Lockwood as the first shift manager and by reducing the house supervisor's role solely to a relief function with the contractual pay differential only for the relief periods. In my judgment, the line of cases cited by Respondent concerning the establishment and promotion of unit employees to a newly created supervisory position is inapposite to the circumstances found here as those cases uniformly find that the new supervisory position did not detrimentally affect unit work.

Contrary to Respondent's further contention, I find nothing in the management-rights provision of the agreement which can be construed as a clear and unequivocal waiver by the Union of its right to bargain over the nearly complete elimination of a unit position and the pay rate applicable to its incumbents. *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982). On the contrary, I conclude that during the term of the agreement, Respondent was legally obliged to obtain the consent of the Union before for the elimination of the house supervisor job and its accompanying position pay differential as was contemplated by the October announcement. *Bonnell/Tredgar Industries*, supra.

Respondent's February revision is more problematical. Although I tend to agree that Respondent's management-rights claim might well permit the house supervisor's job description modifications made at that time, Respondent still faced the practical problem of implementing its overall shift manager's plan without establishing different levels of care at different times of the week. To address this problem, the February plan contemplated the temporary elimination of individual house supervisor jobs as each of the shift managers commenced working. Then, after all of the shift managers were aboard, the February plan would switch employees over to the modified house supervisor job. During the interim period, the unilaterally adopted February revision would suffer infirmities similar to the October plan albeit on a temporary basis. Therefore, even if I assume that the management-rights provision and article 8 of the agreement gave the Respondent the right to modify the house supervisor's job description after discussing it with the individual house supervisors, I am compelled to conclude that Respondent was obliged to obtain the Union's consent for this temporary elimination of the house supervisor's position.6

I further conclude that the recent *Health Care* decision has no effect on the ultimate outcome of this case. In reaching this conclusion, I find it unnecessary to revisit the UC decision in order to determine whether the house supervisors are or are not supervisors within the meaning of Section 2(11) as all parties have urged in one form or another. Suffice it to say that the Regional Director's UC decision applied the law as it existed at that time and, in my judgment, the best that can be said even after the *Health Care* decision is that the supervisory status of the house supervisors as that position was originally constituted remains an open question.

Regardless of the house supervisors' status under the Act, I am satisfied that Respondent struck a bargain with the Union during the negotiations in order to put that issue to rest and that it should be bound by that bargain. Respondent's claim that it did not voluntarily accede to the inclusion of the house supervisors in the current agreement is true but that is not the entire story. Respondent's voluntariness insofar as the inclusion of the house supervisors in the unit ceased in one sense when it filed the UC petition in the first instance. Although Respondent took that step to secure the removal of the house supervisors during the negotiation period, it took the added step of agreeing with the Union to limit its prosecution of the UC petition to the initial decisional level in order to timely conclude the negotiations.

Respondent, by agreeing beforehand that it would not seek review of the UC decision as it was legally entitled to do, effectively agreed to treat the Regional Director's decision as final and binding on the house supervisor's issue dividing the parties in the negotiations. Legally speaking, the parties knew, or should have known, the analytical approach the Regional Director would take in reaching his decision and, in this circumstance, I have concluded that Respondent should be held accountable for this agreement for the same reasons that underlie the Board's policy in not permitting parties to use the unit clarification process to secure the removal of supervisors from a unit after executing a collective-bargaining agreement which includes the supervisors in issue. See, e.g., Edison Sault Electric Co., 313 NLRB 753 (1994), and the cases cited therein.

Accordingly, for reasons detailed above, I conclude that Respondent violated Section 8(a)(1) and (5) of the Act, as alleged, by unilaterally implementing its shift manager's plans insofar as those plans affected the jobs and pay of the incumbent house supervisors. In view of the conclusions reached above, I find it unnecessary to consider the General Counsel's alternative theory concerning removal of unit work.

### B. The Confidentiality Issue

## 1. The relevant evidence

Following the installation of the Quorum management personnel the promised employee surveys did not materialize. After the passage of some time, union representatives made inquiries of management about the anticipated surveys. A definitive response came in July 1993 when Campbell told Corriveau that she was not familiar with Quorum surveys at

<sup>&</sup>lt;sup>5</sup>The reduction of the house supervisor's function to merely a relief category merits the conclusion I have reached that the position was virtually eliminated. This transformation eliminated that job and its pay category except for those limited instances when the shift manager was absent due to vacation, illness, or the like. Repeated assertions by manager witnesses that the house supervisor's position continued to exist because of this limited relief role warrants only that minor consideration necessary to reject those claims as spurious.

<sup>&</sup>lt;sup>6</sup>During his cross-examination of Campbell, the General Counsel repeatedly asked Campbell a lengthy question concerning the nature of the February revision which included a portion as to whether or not the Hospital intended to temporarily suspend the house supervisor's function until all of the shift managers were hired and then post the available house supervisors' jobs. Campbell repeatedly answered with a rote response which failed to answer the question. After I directed Campbell to provide a yes or no answer to the lengthy question, she answered no. On redirect, Respondent sought a partial clarification of this negative answer but it remains unclear as to whether the February revision involves the subsequent posting

of the house supervisor's positions. If so, I conclude that such action further impacts on the incumbent house supervisors' jobs.

other hospitals and that she planned to conduct no survey of any kind until the Hospital had relocated to its new facility.

The news received from Campbell led the units' officers to sign an August 27 letter to Andy Epps, a Quorum official present at the 1992 public forum, protesting Quorum's failure to implement the promised HQT Employee Survey at the Hospital. Copies of the Epps' letter was sent to Campbell and to Fred Peralta, the president of the Hospital's board of directors. In their letter, the union officers specifically requested Quorum to implement the promised HQT Employee Survey "as soon as possible" and threatened that "if one is not being planned for the near future, we intend to implement our own survey with the results being forwarded to the Taos Health Systems board, the physicians, and to the local press."

Peralta, who did not testify in this proceeding, sent identical letters dated September 16 to the unit presidents in response to the August 27 letter. He stated that he was "quite disturbed by your threat to conduct an employee satisfaction survey and to release the results to the Taos Health Systems Board, the physicians and to the local press." He went on to express the view that based on "the Union's previous conduct I anticipate that the survey if conducted will be rigged to reflect the results of your desire" and his belief that "any effort to damage the Hospital in the press can only hurt the Hospital which in turn hurts the employees." In the concluding paragraph Peralta warned that if the Union chose "to conduct a survey and to release it to the press or others . . . your activities will be carefully scrutinized by legal counsel" and that "[a]ppropriate legal and/or disciplinary action" would be taken "in response to any actions on your part or on the part of the members of your respective organizations which are defamatory, constitute interference with contractual relations, and invasion of privacy or in any other way are legally actionable.'

According to Campbell, Peralta's concern with the Union's threat to conduct its own survey and release it to "the press, the community, and the physicians" motivated the Hospital to revise its confidentiality policy. This revision was completed on September 29, and was distributed in the employee pay envelopes on October 1. The new rule provides:

It is the policy of [the] Hospital that any information concerning the business of [the] Hospital, its patients, customers, suppliers, subcontractors, dealers, employees or personnel associated with [the] Hospital is confidential and restricted. You may not reveal any such information except under the direction of your department manager or with his/her approval. If you are not sure about whether particular information is subject to this confidentiality duty, refer your inquiries to your department manager.

Violation of this policy with subject you to the disciplinary procedure up to and including termination.

The previous confidentiality policy at the Hospital became effective May 1, 1991, and read as follows:

It is [the] Hospital's policy that all information regarding the hospital, its patients, physicians, or employees be considered strictly confidential and personal. Under no circumstances will such information be dis-

cussed with any unauthorized person(s) either inside or outside the hospital.

Violation of this confidentiality will subject an employee to immediate discharge.

On October 8, Visse and Corriveau met with Personnel Director Sanchez to seek a clarification of the newly issued confidentiality rule. When asked by the union agents to explain the difference between the old rule and new rule. Sanchez asserted that the new rule merely extended the scope of the old rule to include new categories such as suppliers, dealers, subcontractors, and the like. Sanchez declined Corriveau's request that the Hospital make the policy more specific about matters which could and could not be discussed on the ground that it would be impossible to think of all of the matters to which the policy applied. That response prompted Corriveau to ask about specific examples such as pay and the effects resulting from the new shift manager's position which had been announced in a newspaper advertisement only the day before. Sanchez assured Corriveau that employees could safely discuss their pay but stated, according to Corriveau, that she might be disciplined for discussing the effects resulting from the new shift manager's plan.

Visse was not questioned concerning the details of this meeting. Sanchez' testimony, for the most part, is not at variance with Corriveau's account. Sanchez testified, however, that she told Corriveau that discussions about the shift manager's issue "would be treated on a case-by-case basis, depending on the comments and the context in which they were made." Sanchez never specifically denied telling Corriveau that she might be disciplined for discussing the effects of establishing the shift manager's position.

# 2. Further findings and conclusions

Section 8(a)(1) of the Act prohibits employer interference, restraint, or coercion of employees for their exercise of the fundamental rights guaranteed in Section 7 of the Act. Those rights include "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . the right to refrain from any or all such activities."

The history behind the employee survey establishes that the Union viewed that process as a vehicle for the improvement of working conditions at the Hospital. Contrary to Respondent's contention, I find that the union officers' August 27 letter seeking an assurance that Quorum, clearly an agent of the Hospital, would promptly follow through on the promised employee surveys or risk the public release of a similar survey conducted by the Union constituted activity protected by Section 7. Cincinnati Suburban Press, 289 NLRB 966 (1988), and Auto Workers Local 980, 280 NLRB 1378 (1986).

In view of the protected nature of the Union's activity, I further conclude in agreement with the General Counsel that Peralta's letter threatening legal action or discipline against the Union or its members if they conducted their own survey and publicly distributed the results violates Section 8(a)(1). *GHR Energy Corp.*, 294 NLRB 1011, 1014 (1989), and the cases cited therein at fn. 17.

I likewise find that the revised confidentiality rule violates Section 8(a)(1), as alleged, because it is impossibly vague and designed specifically for the purpose of interfering with employee rights. Kinder-Care Learning Centers, 299 NLRB 1171 (1990). The admitted motivation behind the revised rule was to interdict protected employee activities in connection with the employee survey. Similarly, Sanchez suggested that the rule could also provide a basis for disciplining employees for discussing the house supervisor's issue, obviously a protected activity as it relates directly to a collectively bargained matter. Moreover, for reasons stated in the Kinder-Care case, the requirement that employees secure prior approval from their department manager further inhibits the free exercise of Section 7 rights.

## C. The Martinez' Warning Issue

#### 1. The relevant evidence

Christine Martinez was first employed at the Hospital in 1978. For the past 12 years she has served as one of the Hospital's house supervisors. She works on a part-time basis. Martinez attended the October 4 meeting of house supervisors called by Montgomery to discuss the shift manager's position but she did not speak out at this meeting as did other house supervisors. According to Montgomery, however, Martinez and two other house supervisors were so upset that they walked out of the meeting.

When Martinez received her paycheck on October 1, she immediately noticed that she had not been paid for a day she had worked. Martinez promptly telephoned Sanchez from her nurse's station to complain of the shortage but this conversation was soon interrupted by the press of Martinez' work.

Martinez was unable to take the matter up again until October 5. At that time, Martinez went to Sanchez' office accompanied by Buckingham. Martinez' claims that she told Sanchez at some point in their discussion that their meeting should be considered as the first step in the grievance procedure and that Sanchez thereafter contacted Montgomery who explained the error. Purportedly, Martinez had erroneously completed her time record by reflecting that she had worked on a Saturday during the pay period rather than on a Friday. When the time record was processed for payroll purposes, the Saturday entry was deleted and, as a consequence, Martinez' pay was shorted by 1 day. Martinez argued to Sanchez that this error was the fault of the Hospital because the payroll employee responsible failed to contact her before striking the Saturday entry and insisted that she be paid promptly. At the conclusion of the October 5 meeting, Sanchez told Martinez that she would respond with the Hospital's decision on the following day.

Later on October 5, Montgomery passed Martinez in a hallway and remarked, "It's in the works." The following day Martinez was unsuccessful in reaching Sanchez about the promised decision but she did speak with Montgomery who told her again that "it's in the works, Billy's [meaning Billy Vigil] working on it. I'll have him get back to you." Apparently anticipating her unavailability to address the matter directly with Martinez, Sanchez informed payroll employee Alice Romero to tell Martinez that her supplemental check would be ready the following day.

Around 4 p.m. Romero passed near the nursing station where Martinez was working. The nursing station is in the vicinity of patient rooms so that, in addition to hospital personnel, patients, and their visitors are frequently in the vicinity. Romero stopped to inform Martinez that her check would be ready the following day. As Martinez lives nearly 40 miles from the Hospital, was not scheduled to work the following day, and was committed to remaining at home with her ill husband, she admittedly became upset. According to Romero, Martinez "kind of start[ed] yelling and getting [mad] that her check was not ready." Romero attempted to explain that she was only relaying Sanchez' message and that she was not familiar with the arrangements between Martinez and Sanchez. During the course of their exchange, the payroll employee who actually cuts the checks also came by and joined the exchange. This individual reiterated that the check could not be cut until the following day. Romero claims that several other people were around and she was quite embarrassed by Martinez' conduct.

Rather than proceeding on her original errand, Romero returned to the administration office area to tell Sanchez of her encounter with Martinez. Sanchez in turn escorted Romero to Montgomery's office where the incident was again reported. Montgomery immediately summoned Martinez and, in the presence of Sanchez and a union representative who accompanied Martinez, Montgomery issued a verbal warning to Martinez essentially for unprofessional conduct at the nursing station. According to Montgomery's uncontradicted testimony, Martinez admitted that she had shouted at Romero. Sanchez told Martinez at the conclusion of the disciplinary meeting that Martinez could come to her office and shout at her at any time.

# 2. Further findings and conclusions

The General Counsel contends that Montgomery disciplined Martinez in connection with the latter's pursuit of a contractual grievance seeking to enforce a contract right to be paid for work performed. As Martinez' exchange with Romero and the other payroll clerk involved the timely check cutting in settlement of the pay grievance, the General Counsel asserts that Martinez was, in effect, disciplined for her protected activity. Although it does not believe that the General Counsel established a prima facia case, Respondent argues that its disciplinary action against Martinez was for cause.

The term "concerted activity" used in Section 7 of the Act includes action by a single employee to assert a right contained in a collective-bargaining agreement as that individual activity is deemed to be an extension of the concerted activity that produced the agreement. *NLRB v. City Disposal*, 465 U.S. 822 (1984). An employer violates Section 8(a)(1) of the Act by disciplining an employee engaged in the vindication of a collectively bargaining right. *United Parcel Service*, 301 NLRB 1142 (1991).

In cases when an alleged violation of Section 8(a)(1) turns on the question of employer motivation, the Board and the

<sup>&</sup>lt;sup>7</sup>Respondent argues that it has the right under the managementrights clause to unilaterally amend its confidentiality policy. As Respondent correctly notes, the complaint does not address this unilateral action. The complaint clearly alleges, however, that the revised policy violates Sec. 8(a)(1) but Respondent does not address that separate issue. Hence, even assuming that Respondent can unilaterally establish a confidentiality policy, it is still obliged to promulgate a lawful policy.

courts employ a causation test in determining the merits of the allegation. Wright Line, 251 NLRB 1083 (1980); and NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). Under Wright Line, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action against the employee. Typically, the General Counsel meets this burden by presenting credible evidence showing a reasonable proximity in time between the adverse action in question and the employer's knowledge of, and hostility toward, the employee's protected activity. Best Plumbing Supply, 310 NLRB 143 (1993). If the General Counsel makes a prima facie showing of unlawful motivation, the employer must then shoulder the burden of persuading the trier of fact by a preponderance of the evidence that the same adverse action would have been taken against the employee even in the absence of the protected activity. Id.

Even if I assume in Martinez' case that the General Counsel established a prima facie case of unlawful motivation, I am persuaded that Respondent has met its Wright Line burden. The preponderance of the evidence here establishes a strong causal connection between the disciplinary action and Martinez' outburst directed at Romero in the patient care area of the Hospital which has frequent public visitors. Although it may well be that as this exchange involved an extension of Martinez' grievance activity as it related to the supplementary check resolving that grievance, I have concluded that Martinez' conduct at this time was not protected as it appears to have been a loud outburst in an area where the Hospital has an overriding interest in maintaining a peaceful and harmonious atmosphere. As I find that the disciplinary action taken against Martinez was in pursuit of the Hospital's legitimate interest in maintaining tranquillity in the patient care area rather than in retaliation for her protected grievance activity, I recommend dismissal of the Martinez allegation.

## CONCLUSIONS OF LAW

- 1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act, and is the exclusive collective-bargaining representative of the following appropriate unit of employees under Section 9(a) of the Act:
  - All registered nurses and licensed practical nurses, including house supervisors, employed by Respondent at its hospital facility located at Taos, NM, excluding all other employees, director of nursing service, nurse managers, quality assurance nurses, guards, watchmen, and supervisors as defined by the Act.
- 3. By its letters of September 16, 1993, threatening employees with legal action or discipline, and by promulgating and publishing an overly broad employee policy concerning confidential communications on October 1, 1993, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
- 4. By unilaterally implementing shift manager's plans affecting the jobs and pay of the house supervisors, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

- 5. Respondent did not violate the Act by issuing a disciplinary warning to Christine Martinez on October 6, 1993.
- 6. The unfair labor practices found herein affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that Respondent engaged in certain unfair labor practices, I recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act. Although Respondent's interest in patient confidentiality is obvious and based in the law, the present sweeping policy extends far beyond the Hospital's legitimate interest in confidentiality and was admittedly designed explicitly for the purpose of interfering with employee activity protected by statute. Considering the breadth of Respondent's present policy and its admitted purpose, my recommended Order below requires that Respondent rescind the October 1 policy. Southern Maryland Hospital, 293 NLRB 1209, 1222 (1989).

The recommended Order also requires Respondent, if requested by the Union, to recind any permanent or temporary elimination of the house supervisors' positions made effective on or after October 4, 1993, and to refrain from eliminating that position or its established pay rate for the duration of the current agreement without the Union's consent. The recommended Order further requires that Respondent restore incumbent house supervisors to that position if they were removed from the job during the course of implementing its shift manager's plans described in this decision make those employees whole for any losses incurred by reason of its unilateral actions in that regard. The determination of the precise losses, if any, is left to the compliance stage of the proceeding.8 Backpay shall be computed as prescribed in Ogle Protection Service, 183 NLRB 682 (1970), plus interest as computed in New Horizons for the Retarded, 283 NLRB 1173 (1987).

Finally, the recommended order requires that it post a notice to employees advising of the outcome of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>9</sup>

# ORDER

The Respondent, Taos Health Systems, Inc. d/b/a Holy Cross Hospital, Taos, New Mexico, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Unilaterally eliminating, either permanently or temporarily, its house supervisor's position and the pay rate applicable thereto, during the term of its 1993–1995 agreement

<sup>&</sup>lt;sup>8</sup> Although the record seems clear that one or more house supervisors were displaced when Lockwood was initially hired in late October, the effects of Respondent's February 1994 revision are less certain. To the extent that any losses occurred under the plan as initially implemented or as later revised in February, this make-whole remedy is intended to apply to both situations.

<sup>&</sup>lt;sup>9</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes. The General Counsel's unopposed motion to correct the transcript is granted. All other pending motions inconsistent with this Order are denied.

with the Professional Performance Association and Professional Performance Association Affiliates, affiliated with District 1199NM National Union of Hospital and Health Care Employees, AFL–CIO.

- (b) Threatening to commence legal or disciplinary action against its employees if the Professional Performance Association and Professional Performance Association Affiliates, affiliated with District 1199NM National Union of Hospital and Health Care Employees, AFL–CIO conducts an employee survey related to the employees wages, hours, and other terms and conditions of employment, and publicly releases the survey results.
- (c) In any like or related manner interfering with, restraining, or coercing employees for exercising rights guaranteed by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Rescind the confidentiality policy distributed to employees on October 1, 1993.
- (b) On request of Professional Performance Association and Professional Performance Association Affiliates, affiliated with District 1199NM National Union of Hospital and Health Care Employees, AFL–CIO rescind any plan providing for the permanent or temporary elimination of house supervisors or their pay differential, and maintain that position and pay rate through the remainder of the 1993–1995 agreement absent the consent of that labor organization for its elimination.
- (c) Offer in writing to restore any employee displaced from their house supervisor's position by the permanent or temporary elimination that position on or after October 4, 1993, to their former position as a house supervisor.
- (d) Make any employee whole for losses suffered as a result of the permanent or temporary elimination of the house supervisor position on or after October 4, 1993, as provided in the remedy portion of the administrative law judges decision in this matter.
- (e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (f) Post at its Taos, New Mexico hospital facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint allegation pertaining to Christine Martinez is hereby dismissed.

#### **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT permanently or temporarily eliminate our house supervisors' positions or the pay rate applicable to that position during the term of our 1993–1995 collective-bargaining agreement without the consent of Professional Performance Association Affiliates, affiliated with District 1199NM National Union of Hospital and Health Care Employees, AFL–CIO (the Union).

WE WILL NOT threaten to commence legal or disciplinary action against employees if the Union conducts an employee survey related to the employees wages, hours, and other terms and conditions of employment, and publicly releases the survey results.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our October 1, 1993 confidentiality policy.

WE WILL, on the Union's request, rescind any plan providing for the permanent or temporary elimination of house supervisor positions and pay made effective on or after October 4, 1993, and maintain that position in effect for the duration of our 1993–1995 collective-bargaining agreement if the Union fails to consent to the elimination of that position.

WE WILL offer in writing to restore any employee displaced from their house supervisor's position by permanent or temporary elimination of their position on or after October 4, 1993, to their former position as a house supervisor.

WE WILL make employees whole for losses suffered as a result of the permanent or temporary elimination of their house supervisor's position on or after October 4, 1993.

TAOS HEALTH SYSTEMS, INC. D/B/A HOLY CROSS HOSPITAL

<sup>&</sup>lt;sup>10</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."